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FAQs (Frequently Asked Questions)

1. What is a Revocable Living Trust?

A Revocable Living Trust is an agreement or an arrangement to allow for the distribution of the property of the person setting up the Trust (i.e. the "Settlor" or the "Trustor" or the "Grantor") according to very specific instructions by avoiding Probate as a primary, though not the sole, objective. This objective is achieved by creating and "funding" (retitling property) the Living Trust with the Settlor's property. Therefore, upon the Settlor's death, Probate is avoided because all such property is deemed to have been owned by the Living Trust and not the Settlor individually. The Trustee or Successor Trustee or the "Representative" then administers the Living Trust according to the instructions provided in the Living Trust Document. This is not, however, an "automatic" process. Depending on the nature of the Living Trust, this Trust Administration process may involve a little more than transferring Trust property to a single beneficiary, or it may involve continued administration of property in sophisticated irrevocable trusts. Though much less than the cost of Probate administration, the cost to administering a living trust after the death of a Settlor depends on the type of trust and the complexities involved.

2. When should I have my Living Trust reviewed?

It's a good idea to have your Living Trust reviewed at least once every five years because of your changed circumstances and because tax, inheritance, probate, real estate and family laws may change.

3. What is Probate?

Probate is a court process commenced to settle the distribution of the Estate of someone who dies with or without a Will. If you have a Living Trust, you will likely avoid Probate. The Probate process can be long (from 1 to 3 years or longer for larger estates) and expensive because the Statutorily-mandated fees paid BOTH to The Executor of your Will AND to your Probate Attorney are based on percentage (from 1% to 4%) of the GROSS (not net) value of your Estate. By contrast, the fee paid to an attorney to administer a Living Trust is less but not always insignificant, depending on complexities.

4. If I am a single parent with only one child, do I need a Living Trust?

It depends. If you have only one child and do not own much property other than your primary residence, you may consider using a less costly Revocable Transfer on Death Deed (TOD) instead of a Living Trust to transfer your home Probate free. There are, however, many other factors to consider. For instance, the TOD is a relatively new procedure in California and the law is still evolving and can be uncertain. We consider the TOD as an alternative only in limited cases.

5. Do I still need a Will if I have a Living Trust?

Yes, but the kind of Will prepared in the Living Trust Package is known as a "Pour-over" Will which is designed to capture any part of your residual estate not titled to or included in your Living Trust e.g. later-acquired personal property or other property unintentionally omitted from your Living Trust.

6. Is having a Living Trust always a good idea?

Not necessarily. A Living Trust is not and should not be a "one-size-fits-all" solution to Estate planning. Depending on your unique financial, family, and personal situations, there are many other Non-Probate transfer methods. A Living Trust has many advantages and disadvantages (see the last page of this document.)

7. Should I hold title to my home as “Husband and Wife as Joint Tenants”?

Holding title to real estate as “Joint Tenants” gives the surviving co-owner the AUTOMATIC right to inherit the dead tenant’s share in the property, regardless of any contrary wishes in any Will of the decedent Joint Tenant. In addition, the surviving tenant does not get a “step-up” in basis (for capital gains tax purposes) at the time of the sale of the real property in question. A way to overcome this is either to retitle the Grant/Quit Claim Deed to your home or other property to your Living Trust (if you have one) or record a new Deed vested “Husband and Wife as Community Property with Right of Survivorship”.

8. Should I add my son or daughter to the Deed to my house?

We do NOT recommend this for many reasons:

- A. GIFT TAX returns may have to be filed
- B. LIABILITY EXPOSURE. If a Court judgment is perfected against your co-owner child, (e.g. a lawsuit after a car accident, divorce, bankruptcy etc...) a “Judgment Lien” may be recorded with the County Recorder’s office burdening the title of your home. This will complicate your ability to refinance the loan on your home and cause you to lose half the share of your home.
- C. CAPITAL GAINS TAX. A surviving joint tenant is not entitled to a “Step-up” in basis in the value of the property upon the death of the joint tenant. This may trigger a significant but avoidable capital gains tax liability.
- D. THE JOINT TENANT GETS AND AUTOMATIC RIGHT OF SURVIVORSHIP (see Qu.6 answer above)

9. How do I Divorce-proof my child’s interests?

Some of the ways to protect your child’s property interests in a Divorce or lawsuit are:

- A. Allow the Trustee of your Living Trust to make income distributions to your child “Discretionary” (the Trustee “May” distribute...) instead of “Mandatory” (The Trustee “Shall” distribute...)
- B. Do not make your beneficiary child the Trustee of the Child Trust, but this may require a “continuing” Trust
- C. Empower the Trustee (who should not be your child) the right to make purchases directly for the benefit of your child e.g. paying directly to purchase a car etc.. and/or allow the Trustee to make a “Loan” to your child to make larger purchases such a home.
- D. Include “Support” Trust provisions in your Living Trust to restrict distributions to a “Ascertainable Standard” to pay for your child’s Health, Education, Maintenance and Support.

Caveat: While the above asset-protection measures are in no way fool-proof, they provide an adequate level of protection. The higher the Divorce/Creditors protection the more restricted is your child’s access to income and principal of the Trust property. The idea is to find the right balance. The less the beneficiary’s (i.e. your Child’s) control or appearance of control over Trust property, the higher and the better the protections against Creditors and Divorce Situations. We can customize your Living Trust to meet your exacting requirements according to your specific situation.

10. Why do I need a “Power of Attorney for Finances”?

A Power of Attorney for Finances legally empowers someone else to make financial and other decisions for you in case you become incapacitated. This may empower your “Agent”, among other rights, to write checks, pay bills, buy or sell property on your behalf, file income taxes, deal with Social Security, open and close bank accounts, buy or file insurance claims, sign documents etc. . .

11. Why do I need a “Durable Power of Attorney for Healthcare”?

A Durable Power of Attorney or an Advance Health Care Directive legally empowers your “Agent” to make healthcare & end-of-life decisions for you in case you become incapacitated. Without this document, you may need a Conservatorship which is an expensive and time consuming court procedure to achieve the same things.

12. Should I transfer my bank accounts & safe deposit boxes to my Living Trust?

You have a choice of either retitling your bank accounts into the name of your Living Trust, or simply designating your Living Trust as Primary or Contingent Beneficiary of your bank accounts. This will depend on your unique requirements. Each financial institution (bank) has different requirements and they may assist you with this. Request your bank to name your Safe Deposit Box under the name of the Trustee of your Living Trust.

13. Should I transfer my Stocks, Bonds, Mutual Funds to my Living Trust?

Because of many tax considerations, it is not always recommended that your name your Living Trust as the “Owner” of these accounts. It is customary to name the Trustee of your Living Trust as the Primary or Contingent Beneficiary of such accounts instead. Contact your broker or financial institutions for instructions and procedure.

14. Should I transfer my IRA/401K/KEOGHs, Annuity accounts to my Living Trust?

Only Living persons have life expectancies and only those with "life expectancies" can properly be designated as beneficiaries of IRA accounts. **Do NOT designate your Living Trust as the primary Beneficiary** of your IRA/Retirement/Pension accounts, the entire amount in your account may become IMMEDIATELY TAXABLE! Furthermore, The Secure Act of 2019 prescribes some very specific requirements for Eligible Designated Beneficiaries (EDBs) of IRA and other qualified retirement accounts. The law has become stricter in this area, and making the wrong beneficiary decision can have significant adverse and immediate income tax consequences; nevertheless, in some cases it may be proper to designate your Living Trust as the **Secondary or Contingent Beneficiary**.

15. Should I transfer my Life Insurance policy to my Living Trust?

It is recommended to make your spouse (if married) the primary beneficiary of your Life Insurance proceeds to allow immediate access to liquid cash to pay for post-death expenses. Your children (if any) should be named as the "Contingent" beneficiaries. Depending on your situation, your Living Trust may also be named as the "Contingent" beneficiary. For most people, it is not recommended to name your Living Trust as the "Owner" of your life insurance policy, but for wealthy families an Irrevocable Life Insurance Trust (ILIT) should be considered as a useful tax planning strategy. Note, however, that naming your Living Trust as the Primary Beneficiary of your Life Insurance policy will bypass your distributive instructions stated in your Living Trust. The same applies to bank accounts too.

16. Should I transfer the title to my home and other real estate to my Living Trust?

Yes. Recording a new Grant/Quit Claim deed in the name of your Living Trust is part of "Funding" your Revocable Living Trust in order to facilitate post-death management of your estate without Probate.

17. Should I transfer ownership of my business to my Living Trust?

Yes but the procedure and the legal requirements vary according to the nature and business entity of your business. If you are running your business as a Sole Proprietor, then a simple Assignment of Business document will suffice. The requirements vary, however, for C Corporation, S Corporation, LLCs, Partnership interests, or a Professional Corporation (Doctor, Dentist, Engineer, Attorney..). Each situation has unique requirements and procedures that must be Observed to avoid adverse tax and licensing consequences. Consult with us before making such transfers.

18. Should I file my Tax Returns under the name of my Living Trust?

Advise your tax preparer that you have a "Grantor Trust" (of which your Revocable Living Trust is one type). You do NOT need to file a separate tax return for your Revocable Living Trust while you are alive, but you will need to file an Fiduciary Tax Return and/or, if warranted, IRS 706 Estate Tax return when your Living Trust becomes Irrevocable, for example upon death of a joint Settlor/Grantor/Trustor.

19. What factors are important in choosing my Trustee(s)?

Choosing the right Trustee is very consequential. You may choose an individual Trustee (a relative or friend) or a Professional Trustee.

Individual Trustee

Advantages

- ❶ Familiar with family and family member
- ❷ Less costly than Corporate or Professional Trustee

Disadvantages

- ❶ May not be financially savvy to handle Living Trusts
- ❷ May have personal biases
- ❸ May not be available for many reasons

Corporate or Professional Trustee

Advantages

- ❶ Professional knowledge and Experience in handling Trusts
- ❷ No emotional or personal biases toward family members
- ❸ Almost always available to handle Trust affairs

Disadvantages

- ❶ Usually little or no familiarity with Family
- ❷ Costs more than Family Trustee
- ❸ Less flexible decision making

Brief Summary of the Advantages & Disadvantages of a Revocable Living Trust

Advantages

- ❶ Avoiding costly and lengthy Probate
- ❷ Faster and easier transfer of property to your beneficiaries, compared to just having a Will
- ❸ Privacy, whereas a Will has to be lodged with the Probate Court, a Living Trust does not have to be lodged or recorded

Disadvantages

- ❶ A Living Trust is not always a must, not a "one-size fits all". If your estate is modest, other non-probate transfer methods are available.
- ❷ Costs more than just a simple Will. Setting up a living Trust is not inexpensive.
- ❸ Can complicate your life if your Living Trust is improperly set up. For example, splitting your Living Trust into an Irrevocable living Trust when one of the spouses dies, can be both costly and time-consuming because ongoing income and other tax returns may have to be filed.

Glossary of Terms

For information only

Although these terms may appear in a Living Trust document, this Glossary IS NOT a part of the Declaration of Trust. This is a partial and incomplete list of some pertinent terms.

AGENT: A person designated to legally act on your behalf and make decisions for you. In the Durable Power of Attorney (DPA) document your Agent makes decisions for you which are financial in nature. In the Health Care Directive (HCD) document, your Agent makes healthcare decisions for you. In both documents, the Agent only takes over if you are deemed "incapacitated" by a medical professional.

AMENDMENT: Any change you make to your Living Trust such as changing beneficiaries, successor trustees etc...

AMENDMENT IN THE ENTIRETY: A complete change of your entire Living Trust except for the title and original date of execution. Also referred to as a Restatement of Revocable Living Trust

ATTORNEY-IN-FACT: is your Agent (see Agent above)

BENEFICIARY: A person (or organization or institution) named in your Will or Living Trust to receive benefits such as money or property interests.

BOND: An insurance document issued by a bonding company to pay for losses incurred by the negligence or criminal act of an executor or a trustee.

COMMUNITY PROPERTY: Both Real and Personal property acquired during marriage. Husband and Wife each owns a half-undivided (50-50) interest in the whole.

CONSERVATORSHIP: A Court-appointed representative (Conservator) to care for the affairs of person who becomes incapacitated (a Conservatee)

DECEDENT: A person who has died.

DECLARATION OF TRUST: The legal document that creates a trust.

DESCENDANT: A direct offspring of a person such as a child, grand-child, great grand-child. Descending from an ancestor.

EXECUTOR: The person named in a Will or appointed by Court to wind up the personal and financial affairs of a dead person who had made the Will, such as after paying all debts and taxes, distributing the remaining assets to the beneficiaries in accordance with law and the Will. If legal action is brought against the estate, the Executor is in charge of defending.

GUARDIAN: a person who looks after and is legally responsible for another person who is unable to manage his/her own affairs, especially an incompetent or disabled person or a child whose parents have died.

HEIR: A person legally entitled to the property or rank of another on that person's death. In reality, an Heir is a person who is *entitled under the statutes of intestate succession to the property of the decedent. When a person dies without a Will he is deemed to have died "Intestate". This means Heirs are people who would stand to inherit from someone who died without a Will. (i.e. Intestate)*

INCAPACITY: The physical or mental inability of a person to manage own affairs. Such "incapacity" is determined by a licensed physician or a court of law.

INTER-VIVOS TRUST: Among the living. A living trust established between individuals who are alive.

ISSUE: Direct lineal descendants including children, grandchildren, great grandchildren. May also include adopted children.

MARITAL DEDUCTION: Marital deduction is a type of tax law that allows a person to give assets to his or her spouse with reduced or no tax imposed upon the transfer. Some marital deduction laws even apply to transfers made postmortem. The right to receive property conveys ownership for tax purposes.

POUR OVER WILL: A will created to capture assets or property omitted from the living trust.

POWER OF APPOINTMENT: The right or the authority to change the designation of beneficiaries in a Living Trust.

PRINCIPAL: The principal in an estate or trust is the amount originally received, plus capital gains and less debts, expenses, and capital losses. The principal is sometimes called the "corpus" (or body) of the estate or trust. The income is the interest, dividends, and other income earned by the principal.

PROBATE: A formal court proceeding designed to manage and supervise property distribution upon the death of a person who died with probatable property such as property in a Will or without a Will. Property owned by a Living Trust DOES NOT go into Probate.

REVOCABLE TRUST: A living trust that can be terminated.

RULE AGAINST PERPETUITIES: The rule against perpetuities is a legal rule in the American common law that prevents people from using legal instruments (usually a deed or a will) to exert control over the ownership of private property for a time long beyond the lives of people living at the time the instrument was written. The rule against perpetuities mandates that an interest in land must vest not later than twenty-one years after the death of some life in being at the creation of the interest. In essence, the rule prevents a person from putting qualifications and criteria in a deed or a will that would continue to affect the ownership of property long after he or she has died, a concept often referred to as control by the "dead hand".

SETTLOR: interchangeable with "Grantor" or "Trustor" and refers to the person(s) who creates the Living Trust.

SEPARATE PROPERTY: property not part of the Community Property of married individuals

SPENDTHRIFT PROVISION: spending or distribution restrictions imposed on the share of a beneficiary designated in a Living Trust

TRUSTOR: interchangeable with "Grantor" or "Settlor" and refers to the person(s) who creates the Living Trust.

TRUSTEE: an individual or organization named in the Living Trust to manage, take care and administer the Living Trust.

TRUST ESTATE: in the context of a Living Trust document, a Trust Estate is the property left behind after death.